STATE OF MICHIGAN
IN THE SUPREME COURT

JOSE A. RODRIGUEZ

Plaintiff/Appellee,

v.

FEDEX FREIGHT EAST, INC., RODNEY ADKINSON, LAURA BRODEUR, MATTHEW DISBROW, WILLIAM D. SARGENT, and HONIGMAN MILLER SCHWARTZ AND COHN LLP, jointly, severally and individually,

Defendants-Appellants.

Supreme Court Case No.: 149222

Court of Appeals No.: 312187

LC Case No.: 09-028366-NO

_____/

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SECOND ERRATA TO PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF (WITH INADVERTENTLY OMITTED EXHIBIT 6)

ORAL ARGUMENT REQUESTED

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WHETHER *DAOUD V. DE LEAU* IS RELEVANT TO THIS CASE, WHERE PLAINTIFF ALLEGES THAT DEFENDANTS USED A FORGED NOTARIZED AFFIDAVIT TO, AND DID, DECIEVED AND INDUCED PLAINTIFF'S COUNSEL TO ABANDON PLAINTIFF'S IRON-CLAD OBJECTION AND DEFENSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, RESULTING IN THE DISMISSAL OF SEVERAL OF PLAINTIFF'S CLAIMS?

INTRODUCTION

The Supreme Court's Order states that the parties must address "the relevance of the case, if any, to this Court's decision in *Daoud v. DeLeau*, 455 Mich. 181; 565 NW2d 639 (1997)." The *Daoud* case addresses the question of "intrinsic" fraud as compared to "extrinsic" fraud (which is alleged by Plaintiff). At no time during this litigation has the issue of intrinsic fraud been raised or the *Daoud* case referenced. The Defendants have *not* preserved the issue, and, as a matter of law, have waived the relevance, if any, of *Daoud* to this case.

In the case of *Poelman v. Payne*, 332 Mich. 597, 605 (1952) this Court held:

> As just noted, such claim was not presented to or passed upon by the trial court. It should not now be injected into the case**. To do so would tend to impair orderly procedure in and presentation of appeals; and obviously would be fraught with the possibility of working not only inconvenience but injustice to opposing litigations**. Michigan Court Rule No 67 (1945), in part provides: "Ordinarily no point will be considered (on appeal) which is not set forth in or necessarily suggested by the statement of questions involved." See, also, *Wetzel v. Roberts*, 296 Mich. 114, *Whitley v. Tessman*, 324 Mich. 215; *Mitchell-Morris Co. v. Samaras*, 325 Mich. 425, **Further, in several cases we have held that this Court does not and should not consider for the first time on appeal an issue not submitted to or passed upon by the trial court and as a result of so doing reverse the decision of the trial court.** *Swain Lumber Co. v. Newman Development Co.*, 314 Mich. 437; Toering v. Glupker, 319 Mich. 182; *Village of St. Clair Shores v. Village of Grosse Pointe Woods*, 319 Mich. 372; Coates v. Coates, 327 Mich. 444. In the last citied case we said:
>
> **"This question was not raised by the pleadings or argued or considered by the trial court in its opinion. Under such circumstances we do not consider the question raised in this Court for the first time on appeal."** Id at 605. (emphasis added)

As illustrated above, this rule of law has a long history. The reason that there are so many cases applying this legal principle, are as follows:

(1) The unraised issue has not been explored or developed in the lower court;

(2) It is unfair to the litigants who might be prejudiced by consideration of an issue raised for the first time in the Supreme Court;

(3) As a matter of law, the failure to raise an issue in the courts below precludes consideration by the Supreme Court. In *Young v. Morral*, 359 Mich. 180 (1960) this Court stated:

> An examination of the briefs, disclosures, records, and stipulation indicates that counsel for garnishee **defendant was not relying upon this defense in the lower court, and that if he had in mind relying upon it he clearly stipulated this defense out of the case. The failure to raise a question in the lower court precludes the Supreme Court considering it on appeal**. *Birmingham Park Improvement Assn v. Rosso*, 356 Mich. 88; *Churukian v. LaGest*, 357 Mich. 173, *Poelman v. Payne*, 332 Mich. 597. Id at 183. (emphasis added)

(4) In the case *sub judice*, all allegations in Plaintiff's first amended complaint (which Defendants have never denied) are deemed true. There has been no discovery in this case. Therefore, consideration of the extrinsic vs. intrinsic fraud rule is premature; and

(5) Nonetheless, Plaintiff alleges facts in his first amended complaint which constitutes extrinsic fraud. Specifically, Plaintiff's extrinsic fraud claim is predicated on the *manner* in which Defendants used a forged notarized affidavit to deceive and induce Plaintiff and Plaintiff's counsel to abandon Plaintiff's iron-clad objection to the court considering Defendant's motion for summary judgment, **supported solely by an *unnotarized* affidavit.** The fraud practiced directly on Plaintiff and Plaintiff's counsel prevented a fair contest on Defendants' motion for summary judgment, and prevented Plaintiff from presenting all of his claims to the jury. *Sprague v. Buhagiar*, 213 Mich App. 310, 313-314; 539 NW2d 587 (1995) *United States v. Throckmorton*, 98 US 61, 65, 25 L.Ed. 93, 95 (1878) **(extrinsic fraud is where the fraud practiced directly upon the party seeking relief against the judgment or decree, prevented *that* party from presenting all of his case to the court)**

The Defendants are correct in stating that "this case has a long history." Plaintiff would respectfully submit that Defendants' *extrinsic fraud* is the reason for *that* long history. It is significant that at no time during the last 10 years did Defendants cite to the case of *Daoud, supra*. The reason—is because it does not support Defendants' position.

For the foregoing reasons, it is legally inappropriate for the Court to raise the issue of intrinsic fraud. Full discovery is necessary for Plaintiff's *extrinsic fraud* claim to be fully explored and developed.

ARGUMENT

I. DEFENDANTS USED A FORGED NOTARIZED AFFIDAVIT IN A MANNER INTENDED TO, AND DID (1) DECEIVED PLAINTIFF'S COUNSEL INTO BELIEVING THAT THE UN-NOTARIZED AFFIDAVIT FILED IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT HAD BEEN CORRECTED; AND (2) INDUCED PLAINTIFF'S COUNSEL TO ABANDON HIS IRON-CLAD OBJECTION TO DEFENDANTS' UNNOTARIZED AFFIDAVIT. BECAUSE THE UNDENIED ALLEGATIONS ESTABLISHES EXTRINSIC FRAUD, THE COURT'S DECISION IN *DAOUD V. DE LEAU* HAS NO RELEVANCE TO THIS CASE.

Under the fraud exception to res judicata, a prior judgment may only be attacked on grounds of extrinsic fraud. *Sprague v. Buhagiar*, 213 Mich App. 310, 313-314; 539 NW2d 587 (1995). The *Sprague* Court clarified the distinction as follows:

> Extrinsic fraud is fraud outside the facts of the case: "fraud which actually prevents the losing party from having an adversarial trial on a significant issue." *Rogoski v. Muskegon*, 107 Mich App 730, 736; 309 NW2d 718 (1981). An example of such fraud would be fraud with regard to filing a return of service.
>
> Extrinsic fraud must be distinguished from intrinsic fraud, which is a fraud within the case of action itself. An example of intrinsic fraud would be perjury, *Id.* at 737, discovery fraud, fraud in inducing a settlement, or fraud in the inducement or execution of the underlying contract. *Sprague, supra* at 313-314.

The rule of law governing *extrinsic* fraud was pronounced by the United States Supreme Court 136 years ago. In the oft-cited case of *United States v. Throckmorton*, 98 US 61, 65, 25 L.Ed. 93, 95 (1878), the Court held that:

> "In all cases, and many others which have been examined, relief has been granted on the grounds that **by some fraud practiced directly upon the party seeking against the judgment or decree, that party**

> **has been prevented from presenting all of his case to the court**. Id at 65. (emphasis added)

That is precisely what occurred in the case *sub judice*. Plaintiff alleges that attorney Defendant, Brodeur used a "forged' notarized affidavit that was intended to, and did, *deceived and induced* Plaintiff's counsel to abandon Plaintiff's *iron-clad* procedural objection to the "un-notarized' affidavit filed in support of Defendants' motion for summary judgment. (Ex. 1, Plaintiff's First Amended Complaint, ¶¶ 27-28)

Plaintiff further alleges that the fraud practiced directly upon Plaintiff and Plaintiff's counsel, resulted in the dismissal of three of the four claims filed in Plaintiff's employment action. (Id. ¶¶ 29, 38, 61, 79-84)

Based upon *Sprague*, supra, and the U.S. Supreme Court's decision in *Throckmorton*, supra, Defendants' alleged fraud constitutes *extrinsic* fraud. See also *Granzella v. Jargoyhen*, 43 Cal. App. 3rd 551; 117 Cal, Rptr. 710 (Cal. App. 1st Dist. 1974)

In *Granzella* supra, the Court held that defendant's involvement with promoting a "forged" will constituted extrinsic fraud. The Court noted:

> In the case at bench, in addition to the allegations concerning the will being forged, which would constitute intrinsic fraud, the complaint alleges that before, during and after the probate proceedings, **defendant represented to plaintiffs that of her own personal knowledge the will was the genuine last will and testament of deceased;** that in reliance on the blood and trust relationship between the parties and on the representation of defendant**, plaintiffs did not contest the probate nor discover the fact that the will was forged, until after the distribution of the estate.**
>
> * * *
>
> The interests of justice require that plaintiffs be given an opportunity to prove in court, if they can, that defendant caused the forgery of the will.
>
> The court erred in sustaining the demurrer to the complaint inasmuch as it alleged a cause of action in extrinsic fraud. [43 Cal. App. 3d 557] (emphasis added) (attached hereto)

The facts in *Granzella*, *supra*, are strikingly similar to those alleged in Plaintiff's first amended complaint.

Plaintiff alleges that, at the hearing on Defendants' motion for summary judgment, Plaintiff's counsel vigorously objected to the court considering the motion because it was supported by an "unnotarized" affidavit in direct violation of Rule 56(c)(4) and (e). (Ex. 1, Plaintiff's First Amended Complaint, ¶22) In response, attorney Defendant, Brodeur stated, *on the record,* that she had a "notarized" version of Defendant Rodney Adkinson's affidavit, and would be "happy" to file it, and provide a copy to Plaintiff's counsel. (Id. ¶23; Ex. 2; BR. CT. Hearing Trans. p. 5)

Recognizing the validity of Plaintiff's iron-clad objection, the trial court directed attorney Defendant Brodeur to provide Plaintiff's counsel with a copy of the "notarized" affidavit. (Ex. 2, BR. CT. Hearing Trans. P. 5) The hearing concluded with the court stating that it was taking FedEx's motion under advisement and would issue a written opinion. (Ex. 1, Plaintiff's First Amended Complaint, ¶26) In other words, the court was giving Defendants an opportunity to file a properly supported summary judgment motion—one that complied with the strict mandatory requirements of Rule 56(c)(4) and (e). (Attached hereto)

Plaintiff alleges that a few days after the hearing, attorney Defendant, Brodeur sent Plaintiff's counsel a "notarized" affidavit in a letter dated August 29, 2005. (Id. ¶27; Ex. 3, Attorney Defendant's Letter) **Attorney Defendant, Brodeur represented to Plaintiff's counsel that the "notarized" affidavit had been "signed" by Rodney Adkinson and attached to the motion for summary judgment.** (Id.)

Plaintiff specifically alleges that attorney Defendant's representations deceived Plaintiff's counsel into believing that the "unnotarized" affidavit had been *corrected*. (Ex. 1, Plaintiff's First

Amended Complaint, ¶28) Therefore, the motion satisfied the mandatory requirements of Rule 56(c)(4). (Id.) That in reliance upon attorney Defendant's representations, made to Plaintiff's counsel, **as an *officer of the court,*** he abandoned Plaintiff's iron-clad procedural objection to the court's authority to consider FedEx's' summary judgment motion. (Ex. 1, Plaintiff's First Amended Complaint, ¶¶ 27-28, 79-84)

On December 1, 2005, the bankruptcy court, ***having received no further objection from Plaintiff to the court's authority to consider the "un-notarized" affidavit filed in support of FedEx's motion***, entered an order *granting* summary judgment on *all* of Plaintiff's claims. (Id. ¶29) As it turns out, the "notarized" affidavit sent to Plaintiff's counsel (but not filed and relied upon by the court) was a "forgery." (Id. ¶ 56; Ex. 6, Sinke's Affidavit)

Had Plaintiff's counsel *not* been fraudulently induced into abandoning his *iron-clad* objection to Defendants' *un-notarized* affidavit, the trial court would have been constrained by Rule 56, binding precedents of the Sixth Circuit, and the United States Supreme Court's decision in *Adickes v. S.H. Kress & Co.*, U.S. 144, 158 (1970), to *deny* summary judgment. (An unsworn statement that does not satisfy the requirements of Fed.R.Civ.P. 56 (e) cannot be considered in a motion for summary judgment); see also *Pack v. Damon Corporation*, 434 F.3d 810, 811 (6th Cir. 2006) (An unsworn statement is hearsay "which may not be considered on a motion for summary judgment.") (Ex. 7, State Court Summary Disp. Hearing, pp. 28-29; 31-32; Ex. 1, Plaintiff's First Amended Complaint, ¶ 61)

As made clear by the Sixth Circuit in *Moore v. Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993):

> This court has ruled that *documents* submitted in support of a motion for summary judgment **must satisfy the requirements of Rule 56(e), otherwise they must be disregarded**. (citing *Dole v. Elliott Travel & Tours Inc.*, 942 F.2d 962, 968-69 (6th Cir. 1991), and *State Mutual Life Assurance Co. of America v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979))) Id. at 699. (emphasis added)

There is no question, that Defendants' motion for summary judgment supported by an "un-notarized" affidavit would have been denied. Rule 56(c)(4) and (e)(2)

In addition, attorney Defendant, Brodeur had a motive to avoid submitting the "forged" notarized affidavit to the court. That would have been a very dangerous and unethical step to take. It was easier to simply *deceive* Plaintiff and Plaintiff's counsel.

Here, as in *Nissho Iwai American Corp v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988), attorney Defendant, Brodeur "was on the horns of a dilemma."

> Counsel apparently was on the horns of a dilemma: He had either prepared a flawed affidavit that might otherwise (but for the striking of her pleadings) have protected his client from an adverse summary judgment, **or he had contrived a document intended to allow his client to establish summary judgment proof without the perjury exposure for false statements that is contemplated by the federal rules.** As noted above, Kline's attorneys failed to correct the defect **even after Nissho pointed out in its summary judgment pleadings.** (emphasis added)

Nissho Iwai American Corp, supra at 1307, fn. 10. That explains why attorney Defendant proceeded to *pretend* that the defective "un-notarized" affidavit filed in support of Defendants' motion for summary judgment had been "corrected." As a result of this carefully crafted scheme and deception, Plaintiff's counsel was induced to abandon a procedural defense under Rule 56(e) that would have *defeated* Defendants' summary judgment motion.

Other circuits have also made clear, that affidavits filed in support of a summary judgment motion *must* be either "notarized" under oath, or, declared to be true under the penalties for perjury. Otherwise, the motion cannot be considered. See, *Adickes*, supra. (An unsworn statement that does not satisfy the requirements of Fed.R.Civ.P. 56(e) cannot be considered in a motion for summary judgment)

The Third Circuit in *Woloszyn v. County of Lawrence*, 396 F.3d 314, 322 (3rd Civ. 2005) said:

> The only evidence that could raise a genuine issue of material fact on this record is Shaftic's unsworn statement. The district court did not consider that statement. The court reasoned that since the statement was not in affidavit form, **it was not "sufficient . . . to rely upon . . . in disposing of the pending motion for summary judgment." We believe the court's handling of that unsworn statement was appropriate**. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 n. 17, 90, S.Ct. 1598, 26 L.Ed.2d 142 (1970) (noting that an unsworn statement does not satisfy the requirements of Fed.R.Civ.P. 56(e)). Id at 322 (emphasis added)

In *Orsi v. Kirkwood*, 999 F.2d 86, 93 (4th Cir. 1993) the Fourth Circuit stated:

> Plaintiffs maintain that courts should be "lenient" in accepting documents at the summary judgment stage, as long as they are "probative," or at least "evidence of evidence" that could later be introduced at trial.
>
> **We disagree. Fed.R.Civ.P. 56 prescribes specific procedures to be followed in submitting evidence for or against a summary judgment motion. These procedures help assure the fair and prompt disposition of cases.**
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> * * *
>
> **It is well established that *unsworn*, unauthenticated documents cannot be considered on a motion for summary judgment.** (citations omitted) Id. at 93 (emphasis added)

In *Nissho-Iwai American Corporation*, supra, the Court observed:

> It is a settled rule in this circuit that an unsworn affidavit is incompetent to raise a fact issue precluding summary judgment. A statutory exception to this rule exists under 28 U.S.C. Sec. 1746, which permits unsworn declarations to substitute for an affiant's oath **if the statement contained therein is made "under penalty of perjury" and verified as "true and correct." Kline's affidavit is not in substantial conformity with either formula because, as drafted, it allows the affiant to circumvent the penalties for perjury in signing onto intentional falsehoods**. Kline never declared her statement to be true and correct; ***therefore, her affidavit must be disregarded as summary judgment proof***. See also Flowers v. Abex Corp., 580 F. Supp. 1230 n. 2 (N.D.Ill.1984) (merely notarizing signature does not transform document into affidavit that may be used for summary judgment purposes). Id. 845 F.2d 1300, 1304-05. (emphasis added)

The Seventh Circuit in *Pfeil v. Rogers*, 757 F.2d 850, 857 (7th Cir. 1985) held:

> **An affidavit is a statement reduced to writing and the truth of which is sworn to before someone who is authorized to administer an oath.** Farm Bureau Mut. Auto Ins. Co. v. Hammer, 83 F.Supp. 383, 386 (W.D.Va), rev'd on other grounds, 177 F.2d 793 (4th Cir, 1949), cert, denied, 339 U.S. 914, 70 S.Ct. 575, 94f L.Ed. 1339 (1950); see also Egger v. Phillips, 710 F.2d 292, 311 n. 19 (7th Cir.), cert. denied, - - - U.S. - - -, 104 S.Ct. 284, 78 L.Ed.2d 262 (1983). **Affidavits are admissible in summary judgment proceedings if they are made under penalties of perjury; only unsworn documents purporting to be affidavits may be rejected**. Id at 857 (emphasis added)

In *Markel v. Board of Regents*, 276 F.3d 906, 911 (7th Cir.2002) the Court expressly rejected an affidavit signed by "counsel" in behalf of the affiant. The Court explained:

> Jeffrey Sledge's affidavit ***was not sworn to or certified, and it was not signed by him,*** it was signed by Alan Olson, counsel for Markel. This affidavit should not, and indeed **cannot be considered as evidence because it fails to meet the requirements of Rule 56(e)**. Id. at 911. (emphasis added)

In *DeBruyne v. Equitable Life Assurance Society*, 920 F.2d 457, 467 (7th Cir. 1990) the Court emphasized the rule that an affidavit must be notarized or declared to be true "under the penalties for perjury" pursuant to 28 U.S.C. Sec. 1746. The Court reasoned:

> First, Hanan's supplemental affidavit was not notarized at the time of filing. Moreover, the supplemental affidavit was unable to invoke 28 U.S.C. Sec. 1746 (permits unsworn declarations if made "under penalty of perjury" and verified as "true and correct"). As such, **the "affidavit," which did not subject Hanan to the penalties for perjury, was not within the range of evidence that the district court could consider.** (citations omitted) (Id. at 467) (emphasis added)

In *Watts v. Kroger Company*, 170 F3d 505, (1999) the Fifth Circuit struck several "unsworn" statements filed in opposition to a motion for summary judgment. In so doing, the Court stated:

> We first address Watt's challenge that the district court erred in granting Kroger's Motion to Strike several unsworn statements submitted by Watts. Watts attached to her Motion in Opposition to Summary Judgment several handwritten statements that she had collected from her co-workers. **The statements were signed, but were not sworn, notarized**, **or in the form of affidavits. The district court held that**

> **the statements were not competent summary judgment evidence for the purposes of FED.R.CIV.P. 56(e), and that the statements did not comply with federal requirements for unsworn declarations.** Id. at 507. (emphasis added)
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> * * *
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> We hold that the district court did not abuse its discretion in striking the statements. . . . Though Watt's argument that such a conclusion elevates form over substance may be intellectually compelling, **it is of no practical merit to this court. Rule 56 clearly prescribes the manner in which such documents must be presented to the court.** Id at 507 (emphasis added)

In the case *sub judice*, attorney Defendant, Brodeur was able to avoid having Defendant Adkinson's "un-notarized" affidavit stricken, ***by falsely representing to Plaintiff's counsel that it had been replaced by a notarized version "signed" by Defendant Adkinson***. (Ex. 3, Attorney Defendant's Letter to Plaintiff's Counsel)

The Eighth Circuit, in *Mason v. Clark*, 920 F.2d 493, 494 (8th Cir. 1990) stated:

> On appeal, Mason asserts that the magistrate erred in relying on Lockart's unsigned affidavit as evidence of the security risk. **Appellees apparently disagree and include the unsigned affidavit in their brief.** We have no hesitation in stating that an unsigned affidavit is not sufficient evidence in support of a motion for summary judgment. **In fact, an "unsigned affidavit" is a contradiction in terms**. By definition an affidavit is a "sworn statement in writing made … under an oath or on affirmation before … an authorized officer." Webster's Third New International Dictionary 35 (1965). **Thus, the district court erred in basing its dismissal on the unsigned piece of paper submitted by the state.** *We are also concerned that the Attorney General attached this **unsigned piece of paper** to his addendum, but we are satisfied that what we have said today should ensure that there will not be a recurrence*. Id at 494. (emphasis added)

The above litany of cases, are significant because they establish that Defendants' motion for summary judgment *would not, and could not* have been granted. But in the case at bar, Defendants propose to preclude discovery by admitting, or accepting as *true*, that the signature on the notarized affidavit sent to Plaintiff's counsel was "forged." (Ex. 1, Plaintiff's First Amended Complaint, ¶56)

In the case of *Webbe v. McGhie Land Title Co.*, 549 F2d 1358 (10th Cir. 1977) the Court recognized that discovery is demanded in cases where "forgery" is alleged. The *Webbe* Court stated:

> The issue as to whether a signature on a deed is genuine, or a forgery, presents an issue which in our view can seldom be resolved by summary judgment. Id. at 1364.
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> * * *
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> Suffice it is to say, the genuineness of the Kitt deed must be resolved at trial of the matter, and not by summary judgment. Id. 1365.
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> * * *
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> [T]he question of *genuineness* was *not* fit for summary judgment. Id. (emphasis added)

Here, Defendants continue to avoid the simple process of discovering the truth. Defendants have *not* answered the first amended complaint. Critically, Defendants have *never* denied using the "forged" notarized affidavit as an artifice to deceive and induce Plaintiff's counsel to abandon an *iron-clad* objection that would have precluded the court's dismissal of Plaintiff's claims.

The fact that fraud and deception necessarily involves *cover-up and concealment* is why there is a 6 year statute of limitations. Defendants' carefully planned fraudulent scheme and stratagem remained concealed until June 2008—when the only claim to survive summary judgment in the employment action was tried.

Plaintiff filed this action alleging fraud and abuse of process in November 2009, which was amended in April 2010.

II. THE EXTRINSIC FRAUD CLAIM ASSERTED IN PLAINTIFF'S FIRST AMENDED COMPLAINT IS PREDICATED SOLELY UPON THE MANNER IN WHICH DEFENDANTS USED A FORGED NOTARIZED AFFIDAVIT AS PART OF A SCHEME AND ARTIFICE TO INDUCE PLAINTIFF'S COUNSEL TO ABANDON PLAINTIFF'S IRON-CLAD OBJECTION TO DEFENDANTS' UNNOTARIZED AFFIDAVIT FILED IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT. THAT PRECISE ISSUE HAS NEVER BEEN ADJUDICATED OR NECESSARILY DETERMINED OR EVEN ADDRESSED IN ANY PRIOR FEDERAL COURT JUDGMENT.

It was during the June 2008 trial of Plaintiff's "failure to promote" claim when the fraud practiced directly upon Plaintiff and Plaintiff's counsel began to unravel. Unfortunately, by then three of the four claims asserted in Plaintiff's employment action had been dismissed by summary judgment under Rule 56.

The trial commenced on June 23, 2008. During cross-examination, Defendant Adkinson disclosed facts upon which Plaintiff's "new" state law claims of *fraud and abuse of process* are predicated. For instance, Adkinson revealed that his *unnotarized* affidavit, which resulted in the dismissal of Plaintiff's claims constructive discharge, retaliation, and hostile work environment, contained materially *false* assertions. (Ex. 1, Plaintiff's First Amended Complaint, ¶¶ 38, 50-54)

Adkinson also testified that he did not recall ever signing his name to a "notarized" version of his unnotarized affidavit, and that he needed to actually *see* the "signature" before he could say whether it is his. (Ex. 4, Trial Hearing Trans. pp. 58-59) Attorney Defendant, Brodeur, however, immediately objected to Plaintiff's counsel showing Adkinson the "notarized" affidavit which she had sent to Plaintiff's counsel back on August 29, 2005. The objection was sustained.[1] (Id. p. 59)

Therefore, although the question of whether the "notarized" version of Adkinson's unnotarized affidavit was a "forged" document was raised in the trial of Plaintiff's failure to promote claim–it was, in fact, *never* determined.

The jury returned a verdict in favor of FedEx. The jury answered "no" to the only question they were asked to decide in the 2003 employment action: *whether FedEx failed to promote Jose Rodriguez to a supervisor position because of his national origin*. **Significantly, that was the only issue determined by the jury which was affirmed on appeal.**

On November 17, 2009, Plaintiff filed this action in state court alleging state common law claims of fraud and abuse of process. The relief Plaintiff is seeking is *money* damages.

On December 2, 2009, Plaintiff filed in the federal district court (where the alleged "fraud on the court" occurred) an independent action of Fraud on the Court pursuant to FRCP 60(d)(1) and (3). In that lawsuit, Plaintiff sought *equitable* relief. Specifically, Plaintiff requested the reinstatement of Plaintiff's claims of constructive discharge, retaliation, and hostile work environment, which were dismissed under rule 56.

On December 21, 2009, Defendants removed the state court action to federal court, despite the fact that *only* state law claims were alleged in Plaintiff's complaint. The court granted Defendants' motion to dismiss Plaintiff's "fraud on the court" claim, ***but explicitly declined to exercise federal district court or bankruptcy court jurisdiction over Plaintiff's state law claims***. (Ex. 5, Federal District Court Remand Order)

The district court issued the following remand order on April 1, 2010:

> The state court may decide whether the defendants' alleged acts violated Rule 56, a procedural rule, and more importantly, **whether any of the alleged acts constituted improper conduct and misrepresentations necessary to support Rodriguez's state law claims of abuse or process, fraud, and fraudulent misrepresentations**. Id. at 8 (citations omitted) (emphasis added)

> * * *
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> Federal Rule of Civil Procedure 56(e) generally requires that, in supporting or opposing a motion for summary judgment in federal court, an "affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." 28 U.S.C. §§2071-73 is Congress's enabling legislation authorizing the Supreme Court and all courts established by Congress to adopt federal rules of court, and authorizing the Judicial Conference to publish procedures for consideration of proposed federal rules. **28 U.S.C. §1746 authorizes use of a written unsworn declaration as a substitute for an affidavit which must be subscribed by the declarant as true under penalty of perjury and state in substantially the following form: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)."** Id. at 7. (emphasis added)
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> * * *
>
> Consistent with the court's analysis in Section I, A, supra, this proceeding is based on state law claims and cause of action, and **this court lacks a federal jurisdictional basis even assuming there is bankruptcy jurisdiction consistent with §1334(b)**. Rodriguez first commenced this lawsuit in a state court forum of *appropriate* jurisdiction. **Defendants have not shown, and the court is not persuaded, that Rodriguez's claims cannot be timely adjudicated in state court. Rodriguez's state law claims are not inextricably bound to a right created by the Bankruptcy Code and, thus, this proceeding is a non-core proceeding**. Id. at 10. (emphasis added)
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> * * *
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> IT IS ORDERED that this matter is hereby REMANDED to Michigan's Wayne County Circuit Court.

The remand order conclusively establishes the following critical facts: (1) that Plaintiff's state law claims were *appropriately* filed in state court; (2) that Defendants' *improvidently* removed Plaintiff's state law claims to the federal court; and (3) that contrary to Defendants' argument, the federal district and bankruptcy court *did* have an opportunity to exercise jurisdiction over Plaintiff's post-petition claims of fraud and abuse of process, *but expressly declined to do so*.

Because Plaintiff's claims of fraud and abuse of process were remanded back to the state court ***without an adjudication on the merits,*** the federal court's dismissal of the "Fraud on the Court" action, ***which was filed after Plaintiff's state court action,*** has no res judicata effect. See *Bergeron v. Busch*, 228 Mich. App. 618; 579 NW2d 124 (1988).

Soon after the case was remanded, Plaintiff timely filed a first amended complaint. The complaint asserted "new" allegations based on a report provided by Michael Sinke, a forensic handwriting expert. Mr. Sinke opined in a "sworn" affidavit filed in the state court that his forensic examinations and comparisons of the signature on the "notarized" affidavit, with Defendant Adkinson's "known" signature on the "un-notarized" affidavit (and other *known* writings), **indicate that Defendant Adkinson did not sign the "notarized" affidavit attorney Defendant, Brodeur sent to Plaintiff's counsel on August 29, 2005.** (Ex. 6, Sinke's Affidavit)

It is *undisputed* that Plaintiff's specific allegation that Defendants used a "forged" notarized affidavit to, and did, deceived and induced Plaintiff's counsel to abandon his iron-clad procedural objection to the court's authority to consider Defendants' unnotarized affidavit filed in support of its motion for summary judgment, ***has never been adjudicated or necessarily determined—or even mentioned in any prior federal court judgment***.

Contrary to Defendants' brief, Plaintiff's *extrinsic* fraud claim is *not* based solely upon "false assertions" contained in the forged notarized affidavit, or upon "forgery."

Rather, said claim is predicated upon the manner in which Defendants deceptively used the "forged notarized affidavit" as part of a scheme and artifice prevent a fair contest on FedEx's motion for summary judgment.

Because the first amended complaint specifically alleges that the fraud practiced *directly* upon Plaintiff and Plaintiff's counsel, resulted in the dismissal of three of Plaintiff's claims, Plaintiff has alleged *extrinsic* fraud. See, *Sprague*, supra at 313-314; *Throckmorton*, supra.

Based upon the *un-denied* allegations in Plaintiff's first amended complaint, this Court's decision in *Daoud,* supra, (an *intrinsic* fraud case predicated on "perjury") is inapplicable. Otherwise, the Court of Appeals' decision is correct.

CONCLUSION

The Supreme Court's Order of October 3, 2014 directed the parties to address the relevance of the Court's decision in *Daoud v. De Leau,* supra. That case addressed the question of *intrinsic* fraud. Because Defendants filed a motion to dismiss under MCR 2.116(C)(7) and (8) every factual allegation in support of the claim is accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts and construed in the light most favorable to nonmoving party. *Maiden v. Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999)

Plaintiff's *undenied* allegation that Defendants used a forged notarized affidavit to deceive and induce Plaintiff's counsel to abandon an objection that would have *defeated* Defendants' motion for summary judgment, constitutes *extrinsic* fraud. *Sprague*, supra.

Therefore, the Court's decision in *Daoud* has no relevance to this case. That is the reason that Plaintiff cited a host of cases at the beginning of this brief that state that issues not raised below are deemed waived, and precludes the consideration of non-preserved issues. *Young*, supra.

That well established rule of law is particularly applicable in the case herein. **Defendants never raised the question of intrinsic vs. extrinsic fraud because said question is not applicable to this case.** If the case of *Daoud*, supra, were to be applied to this case, it would

prohibit a motion to dismiss. The *Daoud* case addressed solely the issue of intrinsic fraud. As a result, *extrinsic* fraud (the allegations of which are accepted as true by Defendants) require full discovery and prohibits a motion to dismiss.

. **RELIEF REQUESTED**

For the foregoing reasons, Defendants' Application for Leave to Appeal should be denied.

Respectfully submitted,

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[1]Attorney Defendant, Brodeur's refusal to allow Adkinson to say *under oath* whether the signature on the notarized affidavit was "his" raised Plaintiff counsel's suspicion that Adkinson's signature was in fact a forgery. After the trial ended, Plaintiff hired a forensic document analyst to determine whether the signature on the "notarized" affidavit was signed by Adkinson. The expert opined in a "sworn" affidavit that his examination indicated that Adkinson did not sign the "notarized" affidavit. (Ex. 6, Michael Sinke's Affidavit) However, by the time Defendants' fraudulent act was discovered in 2009, Plaintiff's claims of constructive discharge, retaliation and hostile work environment had already been dismissed by the bankruptcy court in 2005, and affirmed by the district court and the 6th Circuit Court.